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Helmi Hafifi bin Abd Halim v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05(M)-92–02 OF 2017
ZAWAWI SALLEH, ASMADI ASNAWI AND KAMARDIN HASHIM JJCA
21 DECEMBER 2018

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with trafficking in dangerous drugs — Appellant convicted and sentenced to death by hanging — Whether presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 triggered — Whether learned judicial D *commissioner correct in arriving at decision that appellant was trafficking drugs — Dangerous Drugs Act 1952 s 37(da)*

The appellant and one Mohamad Firdaus bin Hashim ('Firdaus') were charged with an offence of trafficking in dangerous drugs in furtherance of their E common intention, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'), read together with s 34 of the Penal Code. Firdaus was acquitted and discharged at the close of the prosecution's case. On 23 April 2013, ASP Abdul Razak bin Osman ('SP4') informed Sergeant Saiful Bahri bin Zi ('SP2'), an agent provocateur ('AP'), of a certain Malay male being involved F in drug trafficking activities in Kulim and Alor Setar. SP4 had instructed SP2 to investigate the matter further. SP2 received information from his informer and contacted 'Mi' to enquire about purchasing 100g of *syabu*. Mi informed SP2 that the purchase price would be RM20,000 and SP2 could take delivery of the said drugs at the Shahab Perdana Bus Terminal. On 24 April 2013, SP2 G relayed the information to SP4. SP4 then held a briefing at IPK Kedah, Alor Setar, with his team to nab the suspect. At about 3.45pm on 24 April 2013, SP2 met Mi that was later identified as the appellant at the trial. The appellant asked SP2 whether he had enough money and SP2 showed him the money. SP2 enquired about the drugs. The appellant then took out a newspaper wrapped H package from his trousers pocket. SP2 had asked the appellant to open the package which he obliged. SP2 saw a translucent plastic bag containing crystallite substance. SP2 gave the signal by taking off his cap and when the raiding party moved in, the appellant threw the package on the floor and attempted to flee the scene together with Firdaus. They were subsequently I overwhelmed by the police and were duly arrested. The package and its contents were also confiscated at the scene and later sent for chemical analysis. The chemist, SP1, confirmed that the impugned drugs was methamphetamine weighing 82.3g which formed the subject matter of the charge. The learned judicial commissioner ('JC') concluded that the appellant had committed an

act of trafficking by way of sale of drugs within the ambit of s 2 of the Act. The learned JC then invoked s 37(da) of the Act to presume trafficking in view of the weight of 82.3g of methamphetamine which was in excess of the statutory weight prescribed in para (xvi) thereof. The appellant at the close of the defence's case was convicted and sentenced to death by hanging. Hence this appeal. The main ground of appeal raised by the appellant was in respect of the uncertainty of the learned JC in failing to make an affirmative finding as to whether the appellant's conviction was premised on direct trafficking or presumed trafficking.

Held:

(1) Regardless of what the prosecution's case was based on, it would be incumbent for the trial judge to make a finding whether the prosecution had made out a case of direct trafficking or a case of mens rea possession and presumed trafficking under s 37(da) of the Act. The wordings 'found in possession' in the opening phrase of s 37(da) was clear and unambiguous and it connoted a finding during a trial by the court. The learned JC did not make an express affirmative finding of possession to trigger the presumption of trafficking. Therefore, the presumption of trafficking under s 37(da) of the Act could not be invoked. The learned JC's finding in respect of the defence's failure to rebut the presumption under s 37(da) was rather bewildering (see paras 22 & 24–25).

(2) The appellant had been placed in a disadvantageous position. The appellant had been saddled with the burden of raising a reasonable doubt. On top of that, he had to rebut the presumption under s 37(da) on a balance of probabilities (see para 28).

(3) The infirmities in the grounds of judgment of the learned JC justified appellate interference. The learned JC's approach to rely indiscriminately on both actual and presumed trafficking was prejudicial to the appellant (see para 29).

(4) Appeal was therefore allowed. The conviction under s 39B of the Act and the death sentence were set aside. In substitution thereof, the appellant was convicted of the offence of possession of dangerous drugs under s 12(2) of the Act, read with s 39A(2) of the Act and sentenced to 20 years imprisonment to run with effect from the date of arrest and ten strokes of whipping (see para 31).

[Bahasa Malaysia summary

Perayu dan seorang Mohamad Firdaus bin Hashim ('Firdaus') didakwa melakukan kesalahan pengedaran dadah berbahaya dengan niat bersama mereka, suatu kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta'), dibaca bersama dengan s 34 Kanun Keseksaan. Firdaus dibebaskan dan dilepaskan pada penutup kes pendakwaan. Pada 23

April 2013, ASP Abdul Razak bin Osman ('SP4') memaklumkan Sarjan Saiful Bahri bin Zi ('SP2'), seorang agen provokator ('AP'), berkenaan seorang lelaki Melayu yang terlibat dalam aktiviti pengedaran dadah di Kulim dan Alor Setar. SP4 telah mengarahkan SP2 untuk menyiasat perkara itu dengan lebih lanjut. SP2 menerima maklumat daripada pemberi maklumatnya dan menghubungi 'Mi' untuk menyiasat tentang pembelian 100g syabu. Mi memaklumkan SP2 bahawa harga pembelian adalah RM20,000 dan SP2 boleh menerima penghantaran dadah tersebut di Terminal Bas Shahab Perdana. Pada 24 April 2013, SP2 menyampaikan maklumat tersebut kepada SP4. SP4 kemudian mengadakan taklimat di IPK Kedah, Alor Setar, dengan pasukannya untuk menangkap suspek. Pada kira-kira 3.45 petang pada 24 April 2013, SP2 bertemu Mi yang kemudiannya dikenalpasti sebagai perayu semasa perbicaraan. Perayu meminta SP2 sama ada dia mempunyai wang yang cukup dan SP2 menunjukkan kepadanya wang itu. SP2 bertanya mengenai dadah tersebut. Perayu kemudian mengeluarkan pakej berbungkus surat khabar dari poket seluarnya. SP2 telah meminta perayu untuk membuka pakej yang mana diikutinya. SP2 melihat beg plastik lutsinar yang mengandungi bahan kristal. SP2 memberi isyarat dengan membuka topinya dan apabila pasukan serbuan menyerang, perayu melemparkan bungkusan ke lantai dan cuba melarikan diri bersama Firdaus. Mereka kemudiannya ditimpa oleh polis dan ditangkap. Pakej dan kandungannya juga dirampas di tempat kejadian dan kemudiannya dihantar untuk analisis kimia. Ahli kimia, SP1, mengesahkan bahawa dadah yang disyaki itu adalah methamphetamine seberat 82.3g yang membentuk subjek pertuduhan itu. Pesuruhjaya kehakiman yang bijaksana ('PK') menyimpulkan bahawa perayu melakukan perbuatan pengedaran dengan cara menjual dadah dalam lingkungan s 2 Akta. PK yang bijaksana kemudiannya menggunakan s 37(da) Akta untuk menganggap pengedaran memandangkan berat 82.3g methamphetamine yang melebihi berat berkanun yang ditetapkan dalam perenggan (xvi). Perayu pada penutup kes pembelaan telah disabitkan dan dihukum gantung sampai mati. Oleh itu rayuan ini. Alasan rayuan utama yang dibangkitkan oleh perayu adalah berkenaan dengan ketidakpastian PK yang bijaksana kerana gagal membuat keputusan afirmatif sama ada sabitan perayu itu didasarkan pada pengedaran terus atau anggapan pengedaran.

Diputuskan:

(1) Tanpa menghiraukan apa yang mendasarkan kes pendakwaan, adalah tanggungjawab bagi hakim perbicaraan untuk membuat penemuan sama ada pendakwaan telah membuat kes pengedaran terus atau kes mens rea memiliki dan anggapan pengedaran di bawah s 37(da) Akta. Perkataan 'didapati dalam pemilikan' dalam frasa pembukaan s 37(da) adalah jelas dan terang dan ia menghubungkan suatu dapatan semasa perbicaraan oleh mahkamah. PK yang bijaksana tidak membuat kesimpulan yang jelas mengenai pemilikan untuk mencetuskan anggapan pengedaran. Oleh itu, anggapan pengedaran di bawah s 37(da) Akta tidak boleh

digunakan. Keputusan PK yang bijaksana berkenaan dengan kegagalan pembelaan untuk membantah anggapan di bawah s 37(da) agak mengelirukan (lihat perenggan 22 & 24–25).

(2) Perayu telah diletakkan dalam kedudukan yang memudaratkan. Perayu telah dibebani dengan beban menimbulkan keraguan munasabah. Di samping itu, perayu terpaksa membantah anggapan di bawah s 37(da) di atas imbangan kebarangkalian (lihat perenggan 28).

(3) Kelemahan dalam alasan penghakiman PK yang bijaksana adalah wajar dengan campur tangan rayuan. Pendekatan PK yang bijaksana untuk bergantung sewenang-wenangnya ke atas kedua-dua pengedaran terus dan anggapan adalah memudaratkan kepada perayu (lihat perenggan 29).

(4) Oleh itu, rayuan dibenarkan. Sabitan di bawah s 39B Akta dan hukuman mati diketepikan. Sebagai ganti, perayu telah disabitkan atas kesalahan pemilikan dadah berbahaya di bawah s 12(2) Akta, dibaca dengan s 39A(2) Akta dan dihukum 20 tahun penjara berkuatkuasa dari tarikh tangkapan dan sepuluh sebatan rotan (lihat perenggan 31).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Abou Sylla v PP and another appeal [2017] 5 MLJ 475; [2018] 1 CLJ 46, CA (refd)
Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya [2011] 6 MLJ 387; [2011] 4 CLJ 113, CA (refd)
Mohd Said bin Samad v PP [1998] 2 MLJ 294; [1998] 2 CLJ 161, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53; [1988] 1 CLJ 229, SC (refd)
Ooi Hock Kheng v PP [2014] 5 MLJ 585; [2015] 1 MLRA 425, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Ishak bin Hj Shaari & other appeals [2003] 4 MLJ 585; [2003] 3 CLJ 843, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC
Reza Hejrani Tekantapeh Esmael v PP [2016] MLJU 1643; [2016] 1 LNS 1507, CA (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Soorya Kumar a/l Narayanan @ Narayanasamy v PP [2011] 5 MLJ 774; [2009] 6 CLJ 257, CA (refd)

A *State v Mello & Anor* [1999] 1 LRC 215 (refd)
Tang Kheng Teong v PP [2003] 3 MLJ 108; [2003] 2 CLJ 701, CA (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Ugonna Philip Nwankwo v PP [2016] 4 MLJ 244; [2016] 2 CLJ 247, CA (refd)

B **Legislation referred to**

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 2, 12(2), 37(da), (da)(xvi), 39A(2), 39B, 39B(1)(a), (2), 40A
C Penal Code s 34

Zamani Ibrahim (Zamani Ibrahim) for the appellant.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

D **Zawawi Salleh JCA (delivering judgment of the court):**

INTRODUCTION

E **[1]** The appellant and one Mohamad Firdaus bin Hashim ('Firdaus') were charged with an offence of trafficking in dangerous drugs in furtherance of their common intention, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'), read together with s 34 of the Penal Code. The charge read as follows:

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> Bahawa kamu, bersama-sama pada 24.4.2013, jam lebih kurang 4.00 petang, di tempat letak motorsikal, hadapan Kedai Pusat Kesihatan Al Munawarah, No 19, Shahab Perdana, Alor Setar, di dalam daerah Kota Setar, dalam negeri Kedah, telah mengedar dadah berbahaya iaitu sejumlah berat 82.3 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama di bawah seksyen 34 Kanun Keseksaan.

G

[2] At the close of the prosecution's case, the learned judicial commissioner ('JC') ruled that a prima facie case had been made out against the appellant and he was called upon to enter his defence. At the close of the defence's case, the appellant was convicted and sentenced to death by hanging as mandated by law. Aggrieved, the appellant lodged an appeal to this court.

H

I **[3]** Firdaus was acquitted and discharged at the close of the prosecution's case. The prosecution did not appeal against the order of acquittal.

[4] We heard this appeal on 17 October 2017. Having heard the submissions, examined the records of appeal and considered the case in light of

the evidence, we unanimously allowed the appeal. We now give our grounds of our decision.

THE PROSECUTION'S CASE

[5] The prosecution placed primary reliance on the evidence of Sergeant Saiful Bahri bin Zi ('SP2'), an agent provocateur ('AP') attached to Jabatan Siasatan Jenayah Narkotik, IPK Kedah. On 23 April 2013, ASP Abdul Razak bin Osman ('SP4') informed SP2, of a certain Malay male being involved in drug trafficking activities in Kulim and Alor Setar. SP4 had instructed SP2 to investigate the matter further.

[6] SP2 received information from his informer that the man was known by his moniker 'Mi' and could be contacted via mobile No '017–4177244'. SP2 called the said number and managed to speak to 'Mi'. SP2 assumed an undercover name of 'Abang'. SP2 enquired about purchasing 100g of 'batu' ie *syabu*. 'Mi' informed SP2 that the purchase price would be RM20,000 and SP2 could take delivery of the said drugs at the Shahab Perdana Bus Terminal ('bus terminal') .

[7] On 24 April 2013, SP2 relayed the information to SP4. SP4 then held a briefing at IPK Kedah, Alor Setar, with his team to nab the suspect. SP4 directed SP2 to play the role of an AP and a sum of RM20,000 ('the flash money') was given to him to make purchase of the drugs from the suspect. SP4 on his part set up an ambush team to arrest the person who would approach SP2 with the drugs. The team left for the designated meeting point after the briefing.

[8] At about 3.45pm on 24 April 2013, SP2 arrived at the food court inside the bus terminal, with the 'flash money'. SP2 received a phone call from 'Mi' enquiring his whereabouts. SP2 informed 'Mi' that he was at the food court. 'Mi' told SP2 to wait and he would go to the meeting place by riding pillion on his friend's motorcycle. Soon after 'Mi' and Firdaus arrived at the scene on a motorcycle. 'Mi' was later identified as the appellant at the trial. SP2 suggested that the appellant and his friend ordered some food. The appellant declined and said they would like something to drink. While the men were having a drink, SP2 asked the appellant about the arrangement ('Mi macam mana') to which the appellant answered 'okey'.

[9] After SP2 paid for their bill, the appellant requested SP2 to come to the motorcycle, which SP2 did. The appellant asked SP2 whether he had enough money and SP2 showed him the money. SP2 enquired about the drugs ('Mi, mana batu saya nak tengok dulu'). The appellant then took out a newspaper wrapped package from his trousers pocket. SP2 had asked the appellant to open

A the package which he obliged. SP2 saw a translucent plastic bag containing crystallite substance. SP2 gave the signal by taking off his cap and when the raiding party moved in, the appellant threw the package on the floor and attempted to flee the scene together with Firdaus. They were subsequently overwhelmed by the police and were duly arrested. SP4 also confirmed that the
B police had arrested two men namely Khairul Anuar bin Ayob ('SD2') and one Mohd Hisham bin Azri ('Hisham'), who were waiting in another car that was parked across the road from the bus terminal.

C **[10]** The package and its contents were also confiscated at the scene and later sent for chemical analysis. The chemist, SP1, confirmed that the impugned drugs was methamphetamine weighing 82.3g which formed the subject matter of the charge.

D **[11]** At the close of the prosecution's case, the learned JC found that the prosecution had proven that the seized drugs were methamphetamine based upon the evidence of SP1. Further, there was no break in the chain of the movements, custody and handling of the drugs exhibit.

E **[12]** The learned JC had concluded that the evidence of SP2 was the main thrust of the prosecution's case, with the evidence establishing that the appellant was involved in a negotiation for the sale of drugs. It was not disputed that SP2 was an AP and his evidence was admissible under s 40A of the Act. The learned JC also accepted the evidence of SP2 who had identified the
F appellant as the same person known as 'Mi' with whom he had been dealing through the phone for the drug transaction and the one he met at the food court. His Lordship thus concluded that the appellant had committed an act of trafficking by way of sale of drugs within the ambit of s 2 of the Act. The learned JC then invoked s 37(da) of the Act to presume trafficking in view of
G the weight of 82.3g of methamphetamine which was in excess of the statutory weight prescribed in para (xvi) thereof. Having satisfied that the prosecution had established a prima facie case, the learned JC ordered that the appellant to enter his defence.

H THE DEFENCE'S CASE

[13] The appellant elected to give evidence on oath. The appellant testified that on 24 April 2013, SD2 invited him and Hisham for a road trip ('makan angin') to Alor Setar, Kedah. SD2 drove a Proton Saga bearing registration
I No NCR 9361. After the Tandop toll plaza (Alor Setar Selatan), they met Firdaus who was supposed to guide them to the bus terminal as they were not familiar with the roads in Alor Setar. When they were approaching the bus terminal, SD2 stopped the car and told the appellant to meet up with SD2's friend at the food court which the appellant obliged. Upon reaching the

vicinity, the appellant went alone to the food court while Firdaus waited on his motorcycle, stationed at the parking area. While waiting for SD2's friend, a man ('SP2') approached the appellant, introduced himself as police and arrested the appellant.

[14] In brevity, the appellant denied meeting SP2 on 24 April 2013 to transact drugs with SP2. He averred that on the day in question, he went with Firdaus to the scene to meet SD2's friend because SD2 told him to do so. The appellant further averred that the wrapped package containing the impugned drugs was seized from the motorcycle's carrier basket. It did not belong to the appellant but it was SD2 who had placed the said package inside the carrier basket. The appellant only came to know that the wrapped package contained drugs when the package was shown to him. He told the police about SD2. He was mistaken to be 'Mi' and did not have mobile phone No 017–4177244. The appellant denied the narratives of the prosecution witnesses, in particular the testimony that he had negotiated with SP2 via telephonic conversation in connection with a drug sale.

[15] At the end of the defence case, the learned JC rejected the appellant's defence as an innocent carrier vis a vis the involvement of SD2. According to the learned JC, it was improbable for the appellant to be so obliging, and for him to do what was instructed by SD2. It was made more improbable when he did not even bother to check the contents of the wrapped package, when he had opportunity to do so. His Lordship concluded that the defence had failed to create a reasonable doubt on the prosecution's case, what more to rebut the presumption of trafficking under s 37(da) of the Act, which required a higher standard. The appellant was thus convicted and sentenced to death.

THE APPEAL

[16] The petition of appeal and the written submission filed by the appellant contained multiple grounds of appeal. However, before us, learned counsel for the appellant canvassed only one main ground of appeal, namely, the uncertainty of the learned JC in failing to make an affirmative finding as to whether the appellant's conviction was premised on direct trafficking or presumed trafficking. Whilst the learned JC had relied on the act of 'selling' to find that the appellant was trafficking in dangerous drugs under s 2 of the Act, he had also resorted to the presumption of trafficking under s 37(da) of the Act. Our attention was brought to that part of the learned JC's ground of judgment whereupon His Lordship had stated as follows:

> 40. Mahkamah ini berpendapat pendakwaan membuktikan OKT(1) mengedar dadah secara terus bergantung kepada keterangan SP2 yang bertindak sebagai Penyamar Sulit. Mahkamah ini juga berpendapat OKT(1) yang bertindak untuk menjual dadah termasuk dalam takrifan pengedaran dadah di bawah s 2 Akta itu.

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48. Mahkamah ini berpendapat berpandukan s 37(da)(xvi) Akta itu apabila memiliki dadah Methamphetamine 50 gram atau lebih dianggap bagi tujuan pengedaran. Dalam kes di hadapan Mahkamah sekarang, OKT(1) memiliki dadah seberat 82.3 gram dan ianya mengaktifkan anggapan s 37(da)(xvi) Akta itu.

B ...

56. Berdasarkan alasan-alasan yang dinyatakan di atas, Mahkamah ini berpendapat pendakwaan membuktikan pengedaran dadah sebagaimana yang ditakrifkan dalam s 2 Akta itu secara terus melalui keterangan SP2 yang bertindak secara Penyamar C Sulit. Mahkamah ini juga berpendapat pendakwaan bergantung kepada anggapan s 37(da) Akta itu iaitu berat dadah yang dibawa oleh OKT(1) melebihi berat yang ditetapkan dan ianya dianggap untuk pengedaran dadah.

D **[17]** Thus, learned counsel submitted that there was a case of misdirection by the learned JC and his client had been prejudiced because the appellant was left in doubt as to the burden of proof imposed on him: whether he was required to raise a reasonable doubt or to rebut the statutory presumption on a balance of probabilities. Learned counsel prayed that the conviction under s 39B(1)(a) be set aside and substituted it with a conviction of possession E simpliciter under s 12(2) punishable under s 39A(2) of the Act.

[18] In support of his submission, learned counsel relied on several cases decided by this court: *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257, *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; F [2014] 4 CLJ 406 and *Ugonna Philip Nwankwo v Public Prosecutor* [2016] 4 MLJ 244; [2016] 2 CLJ 247.

G **[19]** In reply, learned deputy public prosecutor ('DPP') submitted that the approach taken by the learned JC was not fatal and it would not negate the culpability of the appellant in the light of the incontrovertible evidence that he had entered into negotiations for the sale of the drugs and completed the transaction with SP2. The invocation of s 37(da) was a mere surplusage since H the weight of the impugned drugs was above the statutory minimum. The learned DPP further argued that no substantial miscarriage of justice had occurred in the present appeal and urged upon us to invoke the proviso under s 60(1) of the Courts of Judicature Act 1964 ('Act 91') which reads as follows:

I Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[20] Learned DPP relied, among others, on *Public Prosecutor v Ishak bin Hj Shaari & other appeals* [2003] 3 CLJ 843, *Tunde Apatira & Ors v Public*

Prosecutor [2001] 1 MLJ 259; [2001] 1 CLJ 381 and *Tang Kheng Teong v Public Prosecutor* [2003] 3 MLJ 108; [2003] 2 CLJ 701 to fortify his submissions.

OUR DECISION

[21] At the outset, we would like to state that in the case of trafficking, the prosecution may seek to make out a case of actual trafficking or it may seek to rely on one or more of the presumptions in s 37(da) of the Act to make a case of trafficking. But it is a requirement of essential justice that an accused should be made aware at the earliest opportunity as to which option the prosecution seeks to pursue. This will also assist the court to focus on the relevant evidence and enable the defence to direct its cross examination on the material points. In the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, the Federal Court made the following observation:

> Trial judges and defence counsel are most often left guessing until the very end of the trial as to whether the prosecution is relying on direct evidence to prove trafficking or whether they seek to rely on the presumption under ss 37(d) or 37(da) of the Act.
>
> [32] In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in its cross examination along appropriate lines and thereby avoiding a waste of the court's time. See *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, applying *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610.

[22] In the present case, the prosecution's opening statement only made reference to the arrangement made between the appellant and SP2 for the sale of the drugs. There was no mention of possession of the dangerous drugs by the appellant or the prosecution's reliance on the presumption of trafficking. However, in the submission, the prosecution made it very clear that it was relying on proof of direct trafficking and in the alternative if the trial court found no such evidence, the prosecution would prove possession of the impugned drugs. We were of the considered view that regardless of what the prosecution's case was based on, it would be incumbent for the trial judge to make a finding whether the prosecution had made out a case of direct trafficking or a case of mens rea possession and presumed trafficking under s 37(da) of the Act. The need for certainty had also found expression in a number of decision of this court. See, for example, *Soorya Kumar Narayanan*, *Ooi Hock Kheng v Public Prosecutor* [2014] 5 MLJ 585; [2015] 1 MLRA 425, *Reza Hejrani Tekantapeh Esmael v Public Prosecutor* [2016] MLJU 1643;

[2016] 1 LNS 1507 and *Abou Sylla v Public Prosecutor and another appeal* [2017] 5 MLJ 475; [2018] 1 CLJ 46. The decision of this court in *Seyedalireza* in holding that the trial judge ought to make the necessary finding of whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before the court has been upheld by the apex court in *Federal Court Criminal Appeal No 05-53-03/2014(B)*.

[23] In his judgment, the learned JC's conclusion that the prosecution had established a prima facie case was based on the following findings. First, the learned JC found that the evidence from SP2 regarding the negotiation and the transaction between the appellant and himself was for the sale of syabu. The testimony of SP2 was supported and corroborated (although not required by law or as a matter of prudence) by SP4. So, it was a case of a direct trafficking under s 2 of the Act. That, however, was not the end of the matter. The learned JC then went further to invoke the presumption of trafficking under s 37(da). It would have been in order if the invocation was based on the express finding of actual possession. But this was not what he did. The learned JC decided likewise because the weight of the impugned drugs was more than 50g of methamphetamine.

[24] The wordings 'found in possession' in the opening phrase of s 37(da) is clear and unambiguous and it connotes a finding during a trial by the court. The law must now be taken as settled that to invoke the presumption of trafficking, apart from meeting the required minimum quantity, it is necessary for the prosecution to prove the primary facts that the appellant had custody or control and the requisite knowledge of the impugned drugs and the trial judge on his part is required to make an express affirmative finding of the primary facts with regard to the possession of the impugned drugs (see *Mohd Said bin Samad v Public Prosecutor* [1998] 2 MLJ 294; [1998] 2 CLJ 161, *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 and *Ibrahim bin Mohamad dan satu lagi lwn Pendakwa Raya* [2011] 6 MLJ 387; [2011] 4 CLJ 113).

[25] We have perused through the grounds of judgment with a fine toothcomb and we found that the learned JC did not make an express affirmative finding of possession to trigger the presumption of trafficking. Therefore, the presumption of trafficking under s 37(da) of the Act could not be invoked. But yet the presumption of trafficking was clearly invoked, for it was held by the learned JC that the appellant had not 'rebutted the presumption of trafficking'. With respect, under such circumstance, the learned JC's finding in respect of the defence's failure to rebut the presumption under s 37(da) was rather bewildering.

[26] Whilst it is important to produce a speaking judgment, judges must at

the same time be wary of 'speaking' or 'saying' more than necessary. It would give rise to a lot of speculations and open to many criticisms. It was rather unfortunate for the learned JC to have found in the manner as he had so stated. Perhaps the learned JC was being over cautious in making this dual finding in the belief that the prosecution had made out a water tight case against the appellant. We, however, strongly felt that it was unnecessary and inappropriate, especially when it involved the application of presumptive provision.

[27] Where the court had relied on a statutory presumption, it was bound to take the fact as proved unless the accused discharged the legal burden by adducing evidence to the contrary (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53; [1988] 1 CLJ 229). Failure to discharge the burden on a balance of probabilities, even where a reasonable doubt as to guilt exists, would be followed by conviction (see *State v Mello & Anor* [1999] 1 LRC 215). However, the accused only had to raise a reasonable doubt if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumption. The applicability of the presumptive provision must be considered against this background due to the ramifications that ensued. Arbitrary use of presumption when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649).

[28] Reading and judging from the tenor of the learned JC's grounds of judgment, we were in agreement with the learned counsel that the appellant had been placed in a disadvantageous position. The appellant had been saddled with the burden of raising a reasonable doubt. On top of that, he had to rebut the presumption under s 37(da) on a balance of probabilities.

[29] Based on the foregoing reasons, we found that the infirmities in the grounds of judgment of the learned JC justified appellate interference. To our mind, the learned JC's approach to rely indiscriminately on both actual and presumed trafficking was prejudicial to the appellant. We were of the view that this is not a fit and proper case for us to invoke the proviso of s 60(1) of Act 91.

[30] The issue has been settled by the decision of *Soorya Kumar* where Ahmad Maarop JCA (as he then was) said at pp 782–783 (MLJ); p 268 (CLJ):

> [17] ... Perhaps in considering the question of trafficking the learned judge relied on the definition of trafficking under s 2 of the Act. The learned judge's use of the term 'transporting', and his remarks about the accused being identified as 'the transporter' and that the accused knew what he was transporting seem to support the possibility that he had adopted such an approach. The submission of the learned Deputy also seemed to suggest that was the approach taken by the learned trial

judge. Indeed in this case the learned Deputy contended that there was no question of s 37(d) of the Act being invoked. With respect we find it difficult to accept the learned Deputy's submission. In the first place, at the close of the prosecution's case, the learned trial judge did not make any specific finding that the accused had committed any of the acts which constitute trafficking as defined under s 2 of the Act. Secondly, if the learned judge was indeed relying on the definition of trafficking under s 2 of the Act to find a prima facie case against the accused, he could not and should not make the finding that the accused had failed to rebut the presumption under s 37(da) of the Act ...

[18] ... The learned judge seriously misdirected himself and leaves us in serious doubt as to whether at the close of the prosecution's case he was relying on the statutory presumptions under s 37 of the Act or on the proof of actual act of trafficking as defined under s 2 of the Act. In our view, the benefit of the doubt must given to the accused.

CONCLUSION

[31] Having found that there are merits in the grounds raised by learned counsel, we unanimously allowed the appeal. The conviction under s 39B of the Act and the death sentence were set aside. In substitution thereof, we convicted the appellant of the offence of possession of dangerous drugs under s 12(2) of the Act, read with s 39A(2) of the Act and sentenced him to 20 years imprisonment to run with effect from the date of his arrest (24 April 2013) and ten strokes of whipping.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh